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No. 07-1223

In the Supreme Court of the United States

EDWARD NATHANIEL BELL,
PETITIONER,
v.
LORETTA K. KELLY, WARDEN, SUSSEX I STATE PRISON,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE NEW FACTS BELL ESTABLISHED ON FEDERAL HABEAS TOOK HIS CLAIM OUT OF § 2254(d)

The issue before this Court is now cast in sharp relief. Both parties agree the Fourth Circuit erred in taking the more fulsome record developed on federal habeas into account when assessing whether the state court's decision was "unreasonable" under 28 U.S.C. § 2254(d)(1)-(2). Bell contends that, where the state court record is inadequate through no fault of a petitioner, the federal court may receive additional evidence and make its own decision about the merits of the petitioner's constitutional claims. Respondent insists that, so long as the state court's decision is reasonable based on the state court's record, however inadequate, the federal court must close its eyes to new evidence establishing that the prisoner is in custody in violation of the federal constitution. Resp. Br. 62. Respondent derives that conclusion from the following premises:

- Respondent agrees with Bell that unreasonability under § 2254(d) must be demonstrated solely on the state court record. Resp. Br. 56; *see also Holland v. Jackson*, 542 U.S. 649, 652 (2004).
- Respondent insists that a federal court cannot hold an evidentiary hearing under § 2254(e) unless § 2254(d) unreasonability has been proven first. *See* Resp. Br. 46-48.
- Respondent contends that the inadequacy of a state court's fact finding process does

> not establish unreasonability. Resp. Br. 64-65.

Under Respondent's view, therefore, whenever a state court has articulated an internally consistent rationale, the federal habeas court may not receive evidence (let alone grant relief) regardless of how deficient the state court's fact finding process was. As this Court recognized in *Michael Williams v. Taylor*, 529 U.S. 420 (2000), Congress did not intend such blatant unfairness.

A. Bell Preserved This Issue

Respondent's waiver protest, Resp Br. 31-35, is specious. In both courts below, Bell argued that the mitigating evidence he uncovered on federal habeas rendered the strictures of § 2254(d) inapplicable, citing *Monroe v. Angelone*, 323 F.3d 286, 297-99 (4th Cir. 2003). *See* JA-795; Brief of Petitioner-Appellant at 38, *Bell v. Kelly*, No. 06-22 (4th Cir. filed July 13, 2007); Reply Brief of Petitioner-Appellant at 23 & n.9, *Bell v. Kelly*, No. 06-22 (4th Cir. filed Aug. 30, 2007). That put both courts on ample notice of Bell's argument, as *Monroe* held there can be no "[Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA")] deference" on *Brady* materiality (a test indistinguishable from *Strickland* prejudice) where new evidence has been "presented for the first time in federal court." 323 F.3d at 298-99. While Bell did not explain why *Monroe* was correct, he hardly was obliged to expand on the reasoning of binding circuit precedent or to argue the merits in a petition for certiorari.

Respondent also makes a half-hearted estoppel argument, invoking Bell's 2005 assertion that his

federal claim was the same as his state claim. Resp. Br. 34. She fails to mention that in her own brief she told the district court that "[e]ven a cursory comparison between Bell's state habeas petition on [the ineffective assistance of counsel] issue and his § 2254 petition … demonstrates that Bell argued a different claim in the Virginia Supreme Court." Mem. Accompanying Answer and Mot. to Dismiss at 42, *Bell v. True*, No. 7:04CV752 (W.D. Va. filed June 16, 2005). Moreover, Respondent previously agreed with Bell's view that different *facts* give rise to different *claims*. Focusing on Bell's argument that his trial counsel's closing was prejudicial, she told the district court "Bell never raised *that* claim in the Virginia Supreme Court. Bell's claim is foreclosed from review now." *Id.* at 48 (emphasis added) (citations omitted). Both briefs were written before the district court provided Bell the resources he was denied in state court. Bell cannot be faulted for not flagging the significance of new evidence *before* it came to light, but having taken the position that Bell's mere *petition* raised "a different claim," Respondent cannot reverse course now that more evidence has come to light.

B. Significant New Facts Can Give Rise To A New Claim

1. Respondent's Manner Of Reconciling § 2254(d) And (e) Is Misguided

Abandoning the Fourth Circuit's reasoning, Respondent recognizes that evidence newly developed in federal court cannot play a role in the assessment of reasonability under § 2254(d). Resp.

Br. 56. In her view, when a state court makes its decision on an inadequate record, and the inadequacy of the record is not the petitioner's fault (*i.e.*, the petitioner has been found diligent under *Michael Williams*), the federal court may not grant relief unless the state court decision is unreasonable on its face. Resp. Br. 47 ("Only if the applicant shows that the state court decision unreasonably decided the facts presented may a federal court determine the claim *de novo*."). Respondent would have district courts deny hearings in all such circumstances as futile, even if the applicant would otherwise qualify for a hearing under § 2254(e). Resp. Br. 46-49 (describing § 2254(d)-based barriers to a hearing before a court even considers (e)); Criminal Justice Legal Foundation ("CJLF") Br. 24. That reading is harsher than this Court ever has condoned, on par with the "no-fault" theory of § 2254(e) that the same Respondent unsuccessfully urged in *Michael Williams*.

An application of Respondent's theory to three hypotheticals illustrates its flaws. Assume first a prisoner who raised a *Brady* claim on state habeas, but did not then know the full extent of her prosecutor's misconduct because she was denied discovery and a hearing—the facts, for example, of *Monroe*, 323 F.3d at 293-96. Assume the state court addressed and rejected her *Brady* claim. In Respondent's view, that ruling, so long as it was not facially unreasonable, would preclude an evidentiary hearing in federal court. Resp. Br. 47-48 (requiring dismissal without a hearing if state court judgment not unreasonable); Resp. Br. 56 (new facts irrelevant to reasonability analysis).

If Respondent's view of the interaction of (d) and

(e) were correct, such a *Brady* claim would be dismissed with no court ever receiving evidence detailing the depth and breadth of the prosecutor's misconduct. Yet in *Michael Williams*, this Court unanimously held that Congress did not intend "to bar evidentiary hearings for diligent petitioners with meritorious claims just because the prosecution's conduct went undetected in state court." 529 U.S. at 434-35.

Respondent imagines a special *Brady*-only exception to her interpretation. Resp. Br. 55-56. The statutory language provides no such carve-out: § 2254(d) speaks of "claims," not "claims other than *Brady*." And, merely carving out *Brady* claims would not cure the fundamental problem. Consider a hypothetical tracking the facts of *Michael Williams*, with one modification. In the Supreme Court of Virginia, Williams alleged "'improprieties'" in the empanelling "'of the jury,'" but he did so in a motion for investigative resources rather than in his petition. 529 U.S. at 442 (citation omitted). Assume instead a petitioner who presents the same undeveloped claim in his state petition, is diligent just as Williams was, but is likewise denied resources and a hearing in state court and loses the claim. Under Respondent's view, that petitioner would be denied relief under § 2254(d)—the state court's substantive decision would not be unreasonable, *id.* at 442-43 (state court's denial of resources "understandable in light of petitioner's vague allegations")—and would have no right to further factual development or a federal hearing because nothing discovered in federal court would be relevant to that intrinsic § 2254(d) analysis. Resp. Br. 56. That result cannot be squared with this

Court's precedent—Williams did not prevail just because he *left his jury claim out* of his state petition.[1]

Finally, assume a petitioner who raises a claim of improper denial of compulsory process in violation of the Sixth Amendment. Assume the petitioner loses his claim in state court but in federal court satisfies § 2254(e)(2)(A)(ii) and (B)—*i.e.*, he identifies evidence "that could not have been previously discovered through the exercise of due diligence" that establishes his actual innocence "by clear and convincing evidence." Under Respondent's view, that petitioner would also lose in federal court because the newly discovered facts do not give rise to a new "claim," Resp. Br. 32-33, nor can they be taken into account in assessing the reasonability of the state court's decision, Resp. Br. 56. And because § 2254(d) forbids relief in such a case, a hearing would be futile. Resp. Br. 46-49, 56-57. Surely Congress did not intend innocent and faultless petitioners to be deprived of all relief—yet they would under Respondent's interpretation.

Respondent insists her interpretation raises no structural tension because it preserves a role for § 2254(e)(2), *inter alia*, where a state court's judgment has been found intrinsically unreasonable and a federal hearing is required to assess whether relief is warranted. Yet neither Respondent nor her amici reconcile their view—that Congress intended

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[1] This hypothetical also illustrates the flaw in CJLF's crabbed interpretation of § 2254(e)(1). CJLF Br. 20-22. In this circumstance, Congress surely intended the petitioner to be able to rebut state court fact findings by clear and convincing evidence.

to constrain federal review solely to judging the intrinsic reasonableness of a decision rendered on an inadequate state court record—with *Michael Williams*.

Nor does Respondent's position find any other support in this Court's precedent. *Schriro v. Landrigan*, 127 S. Ct. 1933, 1937 (2007), holds that "[i]n cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2), the decision to grant such a hearing rests in the discretion of the district court." While *Schriro* does require courts to take § 2254(d) into account when considering whether an applicant has pled facts that, if true, would entitle him to relief, *id.* at 1940, Bell's interpretation fulfills that requirement—if an applicant proposes to prove facts that would take a claim out of § 2254(d)'s regime, an evidentiary hearing would not be futile under *Schriro*.

The reconciliation of §§ 2254(d) and (e) advanced by Judge Kozinski in *Taylor v. Maddox*, 366 F.3d 992 (9th Cir.), *cert. denied*, 543 U.S. 1038 (2004), is far more plausible than Respondent's. *Taylor* understands § 2254(d) as addressing "situations where petitioner challenges the state court's findings based entirely on the state record" and § 2254(e) as addressing "challenge[s] based on extrinsic evidence … presented for the first time in federal court." *Id.* at 999-1000. Under *Taylor*, such extrinsic evidence has a role to play *even after* a state decision is upheld as reasonable under § 2254(d). *Id.* at 1000. Bell's interpretation of "claim" explains how *Taylor*'s interpretation is consistent with the text of § 2254(d).

2. Amici's Textual Analysis Is Meritless

While Respondent does not grapple with Bell's textual analysis, CJLF does. CJLF Br. 13-23. Ignoring cases that construe "claim"—the actual language of § 2254(d)—CJLF directs this Court to *Sanders v. United States*, 373 U.S. 1 (1963), a case construing the word "grounds." CJLF Br. 14-16. CJLF says those words are "interchangeabl[e]," *id.* at 14, but *Sanders* itself distinguishes them. *Sanders* explains that "a *claim* of involuntary confession predicated on alleged psychological coercion does not raise a different '*ground*' than does one predicated on alleged physical coercion." 373 U.S. at 16 (emphases added). Consistent with Bell's view, *Sanders* treats a "claim" as defined by its underlying facts in a way that a "ground" is not. Moreover, in 1996, Congress amended § 2244 to replace "ground" with "claim," the sort of change this Court ordinarily assumes has meaning. *Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").[2]

Section 2254 distinguishes "ground" from "claim" in the same way. Section 2254(a) authorizes habeas relief "only on the ground that [a prisoner] is in custody in violation of" federal law, while § 2254(d) and (e) divide that larger "ground" up into "claims"

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[2] Though *stare decisis* is not a mix-and-match affair, CJLF takes it upon itself to blue-pencil *Sanders*, rejecting its rule that "[s]hould doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." *Compare* 373 U.S. at 16, *with* CJLF Br. 15.

some of which will have been adjudicated in state court and others of which may require additional factual development. When Congress uses different words, it generally intends different meanings. *E.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 n.9 (2004).

The question before this Court is the level of generality at which a "claim" should be defined. Respondent and her amici calibrate "claim" at a very high level of generality, suggesting that all of a petitioner's various allegations of ineffective assistance of counsel constitute a single "claim." CJLF Br. 18. That cannot be correct. In this very case, the state court recognized (and even assigned numbers to) multiple "claims" of ineffective assistance of counsel, each defined by its operative facts. *E.g.*, Pet. App. 237a, 238a-41a, 244a, 247a. And Respondent's view would wreak havoc elsewhere in the habeas statute. For example:

- The harder it is for new facts to give rise to a new claim, the harder it will be for states to secure dismissals for failure to exhaust under *Vasquez v. Hillery*, 474 U.S. 254 (1986).
- Under the opt-in procedures, 28 U.S.C. § 2264(a) prohibits consideration of "claims" not "raised and decided on the merits in State courts." Under CJLF's view, a petitioner who made any *Strickland* argument in state court has free rein to make more in federal court.

Congress's use of "adjudicated on the merits" also

suggests that a much lower level of generality is appropriate—changes in the facts of a case can dramatically change its "merits," hence Congress should be understood as expecting that a "claim" will be defined with reference to its operative facts. The Sixth Circuit so held in *Joseph v. Coyle*, 469 F.3d 441, 469 (6th Cir. 2006) ("Joseph's current *Brady* claim is not the same as the one he brought before the state courts: he now relies on a different mix of suppressed evidence that includes some items discovered only during federal habeas proceedings. Thus, Joseph argues, his *Brady* claim was *not* 'adjudicated on the merits in State court proceedings,' and AEDPA's strict standard of review does not apply. We agree."), *cert. denied*, 127 S. Ct. 1827 (2007); *see also Monroe*, 323 F.3d at 297-99; *Killian v. Poole*, 282 F.3d 1204, 1207-08 (9th Cir. 2002), *cert. denied*, 537 U.S. 1179 (2003); *Cargle v. Mullin*, 317 F.3d 1196, 1212 (10th Cir. 2003).

Although Respondent and her amici insist that Bell's interpretation of § 2254(d) would open the floodgates, allowing *de novo* review of every habeas case, Resp. Br. 38-39, 58; CJLF Br. 7-9, the rule Bell proposes would actually affect very few cases. As explained in Bell's opening brief (at 38), a petitioner must qualify for an evidentiary hearing under § 2254(e)(2) before he will even have an opportunity to prove new facts. Although CJLF characterizes the *Michael Williams* diligence standard as "permissive," CJLF Br. 8, and Respondent contends it can be met by "a host of ... excuses creative petitioners will find," Resp. Br. 58,[3] the empirical record proves that

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[3] While Respondent claims "it is almost always possible to find an uninterviewed witness or unread document," Resp. Br.

district courts are faithful gatekeepers that honor AEDPA's restrictions. Since passage of AEDPA, applicants in capital cases have received evidentiary hearings less than 10% of the time (and less than 1% in noncapital cases). Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in the U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996* 35-36 (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf. Moreover, in the few cases that do receive hearings, to obtain *de novo* review a petitioner still has to prove new facts that significantly affect the court's application of the relevant constitutional rule (or one of its components) or its impression of the relevant facts. Pet. Br. 39-40. And even then, *de novo* review will apply only to the component of the petitioner's claim affected by the new evidence. *See* Pet. Br. 39.

C. Bell's New Evidence Was Significant Enough To Take His Claim Out Of § 2254(d)

Our law requires that a capital jury be given the opportunity to consider any "mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime." *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1664 (2007); *see also Lockett v. Ohio*, 438 U.S. 586, 608 (1978). The reason is not to convince the jury that the

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38 (emphasis omitted), courts do not find deficient performance based on trivial omissions.

defendant is a model citizen. Defendants convicted of capital crimes never are. But the death penalty is "confin[ed]" to that small class of offenders who are "'the most deserving of execution.'" *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650, 2659 (2008) (citation omitted). Mitigating evidence may prove that a defendant, who concededly committed a heinous crime, is not within that small class "most deserving of execution." Thus, for example, in *Terry Williams v. Taylor*, this Court found prejudice from failure to present mitigating evidence even though the defendant beat one victim to death with a mattock for three dollars, beat an elderly woman into a coma, and set his jail cell on fire. 529 U.S. 362, 368-69 (2000).

When considered on top of the record developed on state habeas, the mitigating evidence Bell newly uncovered in federal court could well have convinced a jury he was not "the most deserving of execution." Amici's own authority, *Roberts v. Louisiana*, 431 U.S. 633, 636-37 (1977), *cited at* VACA Br. 7, recognizes "the absence of any prior conviction" as an example of a mitigating circumstance even where the crime is the killing of a police officer. The absence of convictions is mitigating because it shows that the defendant's crime does not tell the whole story of that person's character. Here, Bell's mitigating evidence (including the absence of prior felony convictions) likewise would have undermined the state's claim of future dangerousness and demonstrated redeeming facets of Bell's character and relationships that might cause a jury, in justice and mercy, to spare his life.

1. Respondent Expressly Concedes That Bell Presented Significant New Evidence On Federal Habeas

Respondent concedes that proof of Bell's historically positive relationships with law enforcement was introduced newly in federal court. Resp. Br. 41. Respondent derides this evidence as "laughable" and "offensive" in light of the crime, *id.*, but the jury well may have felt otherwise. *See Rompilla v. Beard*, 545 U.S. 374, 386 n.5 (2005) (it is "reasonabl[e] to assume that the jury could give more relative weight" to evidence where trial counsel misses an opportunity to explain or rebut). The prosecutor did not think the crime alone sufficient to prove future dangerousness: instead he tried to prove that Bell hated *all* law enforcement officers and therefore would attack prison guards. JA-141. Bell's trial counsel offered no response—to the contrary, Mark Williams told the jury the evidence "was very graphic about a violent man. We didn't rebut it" or "try to defend it, refute it." JA-145. On federal habeas, Bell's new evidence identified specific police officers who knew and liked Bell, JA-514, 588-89, and witnesses who would testify that Bell did not hate law enforcement. JA-513-14, 578, 588-89, 603. A jury shown the full picture easily could have believed that Bell did not hate law enforcement officers generally (and thus would not be a danger to prison guards), especially where the prosecution's guilt/innocence theory was that Bell specifically hated Sgt. Timbrook. Pet. App. 187a-88a. The state habeas court was unaware that a key element of the prosecution's theory was rebuttable.

Respondent also concedes that Enos Davenport's statement (disputing Officer Robinson's testimony that Bell threatened him in jail) was "not ... present[ed] ... to the state court," Resp. Br. 42; *see also* Pet. App. 82a n.17 (district court finding that Bell "presented for the first time in his federal habeas petition ... a letter from Enos Davenport"). Respondent blames Bell, but the district court found Bell was diligent and Respondent does not demonstrate that Davenport's statement, a report written by a jail inmate, was available to state habeas counsel. Davenport's statement refutes testimony of future dangerousness the prosecutor thought important enough to emphasize in closing. JA-141-42. Its significance cannot be denied. *See Banks v. Dretke*, 540 U.S. 668, 700 (2004) (relying on prosecutor's penalty-phase summation in assessing materiality under *Brady*).

2. Respondent Implicitly Concedes That Other Significant Evidence Was New On Federal Habeas

Respondent claims that the beatings Bell suffered as a child were known to Dr. Stejskal and, therefore, to trial counsel. Resp. Br. 43-44. In fact, Dr. Stejskal only mentioned abuse when he quoted one of Bell's sisters denying that it happened. JA-269. But in any event, what matters here is not what *trial counsel* knew, but what the *Supreme Court of Virginia* knew when it found Bell was not prejudiced by his counsel's failures. Respondent does not even *try* to suggest that the state court was aware Bell was abused as a child, nor does Respondent claim the state court considered that fact when evaluating prejudice.

Respondent next attempts to minimize the new evidence of child abuse, claiming that no one used the word "beat." Resp. Br. 43-44. In fact, Bell's aunt and cousins all recalled Bell being "beaten," JA-505, and in any event child abuse "[is] not rendered benign" even if it is "minimize[d]" by "some siblings" due to their "cultur[al]" training. JA-326. Bell was beaten "with electrical cords, belts, wood planks, and brooms," leaving scars he still bears today. JA-323.[4] Bell often would be "awakened in the middle of the night by blows to the head," or "locked in a room" and "deprived of food." *Id*. Even if other habeas petitioners suffered more extreme abuse, the abuse Bell experienced certainly was material enough to warrant consideration by the federal court charged with weighing the *totality* of available mitigating evidence.

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[4] Respondent protests that the report of this abuse was never admitted into evidence, Resp. Br. 43-44, but it is part of the record, having been submitted to the district court as an exhibit in the summary judgment briefing. JA-v-vi. The district court instructed counsel that "all of the" materials "previously filed are part of the record in this case" and that a document "does not need to be reintroduced if it has already been introduced as an exhibit." JA-368-69. For the same reason, Respondent's claim that cards from and pictures of Bell's children were never admitted, Resp. Br. 44, fails—all were exhibits to Bell's initial petition. JA-iv. And the district court met Bell's children and found their introduction "very relevant." JA-561.

Respondent's insistence on evidentiary formalities also founders on *Wiggins v. Smith*, 539 U.S. 510 (2003), which relied on a report that may not have been admissible at all. *Compare* 539 U.S. at 554-55 (Scalia, J. dissenting) *with* 539 U.S. at 536 (evidentiary status of report irrelevant). *Wiggins* also defeats Respondent's hearsay argument at Resp. Br. 40 n.20.

Respondent effectively concedes that the Supreme Court of Virginia also did not have the benefit of the expert opinions of Mr. Cooley and Dr. Cunningham, arguing only that those opinions are "not 'new evidence' of anything." Resp. Br. 45. Respondent recycles her trial objections, claiming their testimony was merely "opinions on what defense attorneys should do in capital cases," *id.*, but the district court rightly overruled Respondent's objections. JA-370, 759. Cooley and Cunningham tendered expert evaluations of how a reasonable jury likely would have reacted to the facts uncovered on federal habeas—direct evidence of prejudice.[5] JA-404-08, JA-763-64. Had Bell sued his trial lawyers for malpractice, he would have been required to prove that his lawyers' errors caused him to lose. Courts nationwide recognize expert testimony as *highly* relevant to that analysis. *E.g.*, 7 Am. Jur. 2d *Attorneys at Law* § 225 (2d ed. 2008) ("The ... consequences of an attorney's tactical choices ... generally require expert testimony in a legal malpractice action."). Expert testimony is equally significant here.

Finally, Respondent claims that evidence of Bell's children's affection for their father introduced for the first time on federal habeas was not "new," as the cards Bell attached as exhibits to his § 2254 petition were dated "pre-trial and during-trial." Resp. Br. 44.

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[5] Indeed, this testimony was the *only* direct evidence of prejudice available to Bell. While one of Bell's jurors swore in an affidavit that she was looking for any reason whatsoever "not to sentence him to death," JA-215, Bell was precluded from introducing that evidence. He tendered instead the opinions of experts well-experienced in the way capital juries react to evidence.

But the mere fact that mitigating evidence *existed* does not mean that it was *discovered* and *presented* on state habeas. And not even Respondent denies that a loving child's plea for mercy easily could have moved one or more of Bell's jurors. Indistinguishable evidence sufficed to prove prejudice in *Harris v. Dugger*, 874 F.2d 756, 761-64 (11th Cir.), *cert. denied*, 493 U.S. 1011 (1989), *Collier v. Turpin*, 177 F.3d 1184, 1201-04 (11th Cir. 1999), and *Marshall v. Cathel*, 428 F.3d 452, 470-74 (3d Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006). Surely it is important enough to be considered as part of the totality of mitigating evidence *Wiggins* commands courts to weigh.

3. Respondent Mischaracterizes Bell's Remaining Evidence

Respondent contends that evidence disputing Bell's general propensity for violence was not new because some of the same facts were captured in the state court affidavits of Tracy and Joanne Nicholson. Resp. Br. 40-41. In state court, with no court-appointed investigator and no hearing, Bell was able to present only basic assertions by the Nicholsons that he was "never violent." JA-188-91. But those bare points do not compare with the evidence Bell was able to present in federal court. Albarus testified that Bell has a reputation in his community in Jamaica as "non violent and non retaliatory," and that his conviction for tearing a shirt was seen as trivial by the ostensible victim. JA-513. Anderson testified that, in Jamaica, Bell never got into fights or expressed animosity towards police. JA-603. Henderson testified that, when she knew and worked with Bell in the United States, she never

saw him act violently toward anyone. JA-584. Joanne Nicholson, who lived in a home with Bell for almost three years, expanded on her affidavit and explained that she never saw Bell act violently or threaten anyone. Pet. App. 81a, 172a. The federal court saw far more evidence that Bell would not be a future danger than the state court did.[6]

Finally, Respondent ridicules the notion that hearing live testimony is materially different from reading abbreviated affidavits. Resp. Br. 42. Obviously, a district court cannot exempt itself from § 2254(d) merely by hearing live the testimony that is already available in the state court record. Pet. Br. 44-45. Equally obviously, however, the additional information a district court receives by watching live testimony cannot be irrelevant—especially here, where the ostensible flaw in Bell's mitigation case was the credibility of his witnesses and their supposed vulnerability to impeachment and cross-examination. *Compare* Pet. App. 240a (state court questioning credibility of Nicholsons' affidavits) *with* Pet. App. 172a (district court, after hearing, finding Nicholson "would have been a helpful mitigation witness"). On direct review, the advantage derived from seeing live testimony can be so important as to render a fact finding essentially unreviewable. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). It cannot be that the very same information is utterly immaterial on collateral review.[7]

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[6] For an item-by-item listing of new testimony given by witnesses who submitted affidavits in state court, see Petitioner's Reply on certiorari at 3-5.

[7] Although Respondent insists that the Supreme Court of

4. The Totality Of Bell's New Mitigating Evidence Was Significant

Ignoring *Williams* and *Wiggins*, Respondent claims *Strickland* proves Bell's mitigating evidence was meaningless.[8] Resp. Br. 60-63. But the sentencer in *Strickland v. Washington*, was a judge who could not give a life sentence unless he found the mitigating circumstances "outweighed" three "especially heinous, atrocious" murders "involving

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Virginia "assumed the truth of Bell's allegations," *e.g.*, Resp. Br. i, 1, 16, its opinion is replete with examples to the contrary. *See* Petition for Rehearing of Petitioner-Appellant, *Bell v. True*, No. 030539 (VA filed May 28, 2004).

[8] On *Strickland*'s back, Respondent now criticizes the district court's finding of deficient performance. Resp. Br. 60-63 & n.29. But in her Brief in Opposition Respondent did not raise that issue as an alternative ground for affirmance that should bar this Court from reaching Bell's Question Presented. In any event, the district court's deficiency ruling was sound and rested on its assessment of witnesses' credibility. JA-798. Respondent called trial counsel, and the court heard their explanation for discharging Marie Deans, relying on Dr. Stejskal, and not interviewing Barbara Williams, Carol Anderson, Dawn Jones, or Joanne Nicholson. JA-656-57, 688, 724-25, 729-33, 749. The court also heard those witnesses dispute trial counsel's claims, JA-421-28, 460-62, 477-81, 549-51, 568-71, 593-94, 603-05, and it disbelieved trial counsel. JA-799-800, 802. The district court had an insurmountable advantage, having seen the witnesses' demeanor. *Miller-El v. Cockrell*, 537 U.S. 322, 339-40 (2003). And whereas counsel in *Strickland v. Washington* had a mitigation strategy involving acceptance of responsibility and remorse, 466 U.S. 668, 673-74 (1984), counsel for Bell did not, as explained in Bell's reply on certiorari at 1-2. *See also* Pet. App. 174a; JA141-43, 150, 784, 785-87, 793-94. Bell's counsel presented "literally no mitigating evidence." JA-647; *see also* JA-648, 793.

repeated stabbings." 466 U.S. 668, 674-75, 700 (1984). Bell's jurors, by contrast, were not required to "weigh" anything, but rather were free to show "mercy" and give a life sentence if they "believe[d] ... that the death penalty is not justified" for Bell's crime (which the trial judge found, as a matter of law, was not "vile"). JA-158-59; CAJA 142-43. Moreover, the petitioner in *Strickland* presented internally contradictory evidence and weak character evidence, 466 U.S. at 699-700, not evidence contradicting the sole aggravating factor, evidence of child abuse, or evidence of loving children who would be bereaved by his loss. Respondent notes that eleven judges dismissed Bell's mitigating evidence, Resp. Br. 63, but thirteen dismissed Rompilla's, ten dismissed Williams', and nine dismissed Wiggins'.

The mitigating evidence Bell uncovered on federal habeas would have undermined the prosecutor's sole aggravating factor, Pet. Br. 42-46, shown the jury the abusive childhood that shaped Bell's development, Pet. Br. 46-48, and shown the jury that despite his handicaps, Bell still formed redeeming human relationships and that his family loves him and would grieve his loss. Pet. Br. 48-50. When this evidence is considered collectively with the evidence Bell was able to adduce on state habeas, at least one of Bell's jurors likely would have had a reasonable doubt about future dangerousness, found his culpability diminished by abuse, or elected to show mercy out of compassion for the diverse frailties of humankind or out of consideration for Bell's children. *See Wiggins*, 539 U.S. at 537 (prejudice shown by "reasonable probability that at least one juror would have struck a different

balance").

Expert testimony Bell presented in federal court confirms that point. Pet. Br. 50-51. Obliged to "reweigh the evidence in aggravation against the totality of available mitigating evidence," *Wiggins*, 539 U.S. at 534, the Supreme Court of Virginia could not because it never saw the "totality" available to the federal court. There was thus nothing to which the federal court could plausibly defer. *See Monroe*, 323 F.3d at 297-99; *Joseph*, 469 F.3d at 469; *Killian*, 282 F.3d at 1207-08; *Cargle*, 317 F.3d at 1212.

D. Bell Is Not Procedurally Defaulted

Though Respondent contends that any new "claim" Bell presented in federal court must be procedurally defaulted, Resp. Br. 57, she long since waived that argument, having failed to assert it in district court, before the court of appeals, or in her Brief in Opposition. The contention, moreover, is meritless. In *Michael Williams* this Court unanimously established that a petitioner who was diligent in state court, and thus permitted to develop new facts in federal court, has "establish[ed] cause for any procedural default [he] may have committed in not presenting these claims to the Virginia courts in the first instance." 529 U.S. at 444. That was no casual turn of phrase—the issue briefed was whether the denial of discovery, assistance, and a hearing in state court constituted "cause." *See* Respondent's Brief, *Michael Williams v. Taylor*, 2000 WL 126196, No. 99-6615, at *34-35 (Jan. 31, 2000). This Court unanimously answered "yes," holding that where a prisoner is "diligent" within the meaning of *Michael Williams*, the "state courts" are given "their rightful *opportunity* to adjudicate

federal rights." 529 U.S. at 437 (emphasis added).

Here, the district court expressly found that Bell was "diligent[]" and that the state court process was ineffective to protect Bell's rights on this claim—holding that "'the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing.'" Pet. App. 84a (citation omitted). When the state court refused assistance and refused a hearing, *it* impeded the development of Bell's claim—which establishes cause for any procedural default Bell committed. 529 U.S. at 444. And prejudice is established by the merits of Bell's underlying claim. No more is necessary.[9]

II. RESPONDENT'S UNTIMELY DILIGENCE ARGUMENT CANNOT BAR RELIEF

In an effort to distract this Court from the statutory question upon which it granted certiorari, the appropriate treatment of Bell's new evidence under § 2254(d), Respondent and her amici dispute whether Bell was sufficiently diligent in state court to warrant the admission of that evidence under § 2254(e). *See, e.g.*, Resp. Br. 28-29, 31-33, 36-39, 42-45, 47, 49-51, 54-62, 64, 65; VACA Br. 27-33; Idaho Br. 12-14; CJLF Br. 7-9, 23-27. That argument is long since waived, is defeated by the district court's diligence finding, and in any event is irrelevant to this case.

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[9] That conclusion is confirmed by § 2254(b)'s exhaustion rule. Section (b)(1)(B)(ii) excuses exhaustion if "circumstances exist that render [State corrective] process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1).

A. Respondent Waived Any Challenge To Bell's Diligence

The Question Presented clearly framed the issue as the treatment of new evidence "that was properly received for the first time in a federal evidentiary hearing." Pet. i. In her Brief in Opposition, Respondent did not dispute that Bell's evidence was properly received under *Michael Williams*. She cannot do so for the first time now. S. Ct. R. 15.2.

But Respondent waived this argument even before omitting it from her Opposition. In the district court, when Bell argued diligence under § 2254(e)(2) in his response to the motion to dismiss, Brief of Petitioner in Opposition to Motion to Dismiss at 118-20, *Bell v. True*, No. 07:04CV752, (W.D. Va. filed Aug. 1, 2005), Respondent did not disagree. *See* Reply Brief of Respondent at 10-11, *Bell v. True*, No. 07:04CV752 (W.D. Va. filed Aug. 22, 2005). The district court found Bell diligent, and ordered a hearing. Respondent did not seek interlocutory appeal or a writ of mandamus, as she did in *Michael Williams*, 529 U.S. at 427-28. And Respondent never challenged Bell's diligence before the court of appeals. This issue, thus, has long been waived. *See Danforth v. Minnesota*, 128 S. Ct. 1029, 1046 (2008) (states waive defenses they fail to raise timely on federal habeas).

Respondent's claim that she "has argued consistently that no hearing was authorized," Resp. Br. 58, is misleading. In the court of appeals, Respondent argued that the district court abused its discretion by granting an evidentiary hearing because nothing Bell proposed to prove could establish unreasonability under § 2254(d).

Respondent-Appellee Brief at 30-31, *Bell v. Kelly*, No. 06-22 (4th Cir. filed Aug. 13, 2007). But that argument only matters if Respondent prevails on the Question Presented; it is not an independent reason to decide the Question her way. Besides, an argument that the district court should have exercised its discretion to deny a hearing hardly preserves the argument that § 2254(e)(2) did not leave the district court any discretion to exercise. In considering Respondent's waiver, moreover, it is irrelevant that Respondent prevailed in district court. Resp. Br. 58-59 n.28. Having engaged on the propriety of an evidentiary hearing before the court of appeals, Respondent was not free to save her diligence argument for a rainy day.

B. Bell Diligently Developed The Factual Basis Of His Claims In State Court

Regardless, Respondent's diligence argument fails on the merits. The district court found that Bell was diligent in developing his facts in state court, Pet. App. at 84a, and that finding may be reviewed only for clear error. *See, e.g.*, *Drew v. Dep't of Corrections*, 297 F.3d 1278, 1287 n.2 (11th Cir. 2002), *cert. denied*, 537 U.S. 1237 (2003), *overruled in part on other grounds by Sykosky v. Crosby*, 187 Fed. Appx. 953 (11th Cir. 2006). When reviewing for clear error, this Court "will not reverse a lower court's finding of fact simply because [it] 'would have decided the case differently.'" *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citations omitted).

Respondent argues that Bell could not have been diligent because "[e]very part of Bell's federal claim existed legally and factually in exactly the same form and exactly as was available to Bell in state

court." Resp. Br. 59-60. But that is not the right standard. In *Michael Williams*, the same Respondent similarly argued that the facts later adduced in federal court were available to state habeas counsel. Respondent's Brief, *Michael Williams v. Taylor*, 2000 WL 126196, at *25-26. This Court found that irrelevant, 529 U.S. at 443, explaining that "[t]he question is not whether the facts *could have* been discovered, but instead whether the prisoner was diligent in his efforts." *Id.* at 435.

Bell's efforts to pursue his claim on state habeas closely track those found sufficient in *Michael Williams*. This Court held that, to be diligent, a petitioner at a minimum must "seek an evidentiary hearing in state court in the manner prescribed by state law." *Id*. at 437. Bell did that, as Respondent readily concedes. Resp. Br. 15-16; *see also* Corrected Petition for a Writ of Habeas Corpus at 3, 47, *Bell v. True*, No. 030539 (Va. filed Apr. 21, 2003).[10] Thirty-one states apparently agree that Bell's request for a hearing is probative of diligence. *See* Idaho Br. 12.

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[10] Respondent characterizes Bell's request for an evidentiary hearing as a "routine prayer," Resp. Br. 15-16, but the Supreme Court of Virginia *never* has held such a request inadequate. And though not so required, Bell connected his requests for aid and a hearing with his ineffective assistance allegations in his Motion for Leave to File Amended and Supplemental Petition for Writ of Habeas Corpus at 4-5, *Bell v. True*, No. 030539 (Va. filed Feb. 20, 2003) ("Motion for Leave"), his Motion for Leave to Supplement Petition for Writ of Habeas Corpus On or Before June 23, 2003 at 1, *Bell v. True*, No. 030539 (Va. filed Apr. 21, 2003), his Motion for Expert Assistance at 1, *Bell v. True*, No. 030539 (Va. filed June 25, 2003), and his Motion for Discovery at 8-9, *Bell v. True*, No. 030539 (Va. filed Jan. 20, 2004).

Petitioner in *Michael Williams* also sought an investigator and expert assistance. 529 U.S. at 442. So did Bell. Corrected Petition at 47. Respondent opposed each of Bell's requests, directly and proximately hindering Bell's factual development in state court. She hardly can be heard to complain now about a problem she helped create.

Denied an investigator or any expert resources, Bell undertook such investigation as he reasonably could under the circumstances. Bell was given only 120 days to assemble and review the voluminous record, investigate all relevant facts, and prepare and file his petition, which raised numerous claims. *Compare* 28 U.S.C. § 2244(d)(1)(D) (allowing one year from the time factual predicate could have been discovered). While state law requires that qualified habeas counsel be appointed, VACA Br. 22, Bell was given lawyers with no capital habeas experience and with active trials compromising their ability to work on Bell's case. *See* Motion for Leave at 2. Appointed on November 15, 2002, Bell's lawyers found themselves working over the holiday season, when trial counsel and witnesses were on vacation, and when courthouses and record repositories were often closed. The record they finally extracted from the trial court and Bell's trial counsel stood as much as twelve feet high and was missing key pages. *See* Motion for Leave at 4. On that basis, counsel sought an extension of time, which was denied. *See* Motion for Leave at 4-7; Order Denying Motion for Leave to File Amended and Supplemental Petition for Writ of Habeas Corpus at 1, *Bell v. True*, No. 030539 (Va. filed Feb. 28, 2003). *Michael Williams* requires "a *reasonable attempt* ... to investigate and pursue claims in state court," not perfection. 529 U.S. at 435

(emphasis added). Under the circumstances, Bell's efforts were more than reasonable.

Respondent's protest that the relevant evidence was always "within Bell's own knowledge," Resp. Br. 32, reflects a willful failure to acknowledge Bell's limited capacity and the realities of capital defense. The petitioners in *Terry Williams*, *Wiggins*, and *Rompilla* also all presumably knew that they were abused as children, yet this Court faulted the trial lawyers in all three cases for not conducting *their own* investigation. *See Terry Williams*, 529 U.S. at 395-96; *Wiggins*, 539 U.S. at 534-35; *Rompilla*, 545 U.S. at 381-82, 389-93. And with good reason. The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, to which this Court repeatedly has turned, *see, e.g.*, *Strickland*, 466 U.S. at 688; *Wiggins*, 539 U.S. at 524, recognize that a defendant cannot be expected even to understand what mitigating evidence *is*, let alone to plumb his own life history, identify relevant mitigation, and serve it up to counsel (either trial or state habeas) on a silver platter. *American Bar Association: Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 952, 958, 1015 (2003) ("obligation" to investigate mitigating evidence rests with "counsel at every stage," including state habeas). Such an expectation would be particularly absurd when applied to Bell—a foreign national with virtually no understanding of the American legal system and an IQ at best somewhere "between the upper 70's" and "mid 80's." JA-428.

C. A Finding That The District Court Erred In Holding A Hearing Would Not Justify Disregarding Evidence Now Before The Federal Courts

Respondent assumes that if she demonstrates the district court erred in holding a hearing, the federal courts now must close their eyes to the evidence adduced. Suppression of evidence is always a last resort, as it compromises truth-seeking. If Respondent believed the district court erred in determining to hold a hearing, she had ample opportunity to seek reconsideration, raise the issue in her summary judgment motion, or seek an interlocutory appeal or writ of mandamus. *Compare Michael Williams*, 529 U.S. at 427-28. Respondent did none of those things. Instead, she allowed the court and the parties to invest time and effort in the conduct of an evidentiary hearing only later to ask courts to ignore the evidence presented. This Court should decline that invitation.

III. IN THE ALTERNATIVE, THE COURT OF APPEALS ERRED IN NOT FINDING THAT THE STATE COURT'S PROCEDURES UNREASONABLY APPLIED CLEARLY ESTABLISHED FEDERAL LAW

Respondent asserts that Bell's *Panetti* argument is new. Resp. Br. 64-65. But the Question Presented asks whether the Fourth Circuit erred "when ... it applied" § 2254(d) to evaluate a claim based on evidence newly adduced on federal habeas, where the state court's prior "fact-finding procedures were inadequate to afford a full and fair hearing." Pet. at

i. Bell's *Panetti* argument provides a valid reason for answering that question in the affirmative because the Fourth Circuit erred not only in applying § 2254(d) at all, but also in how it applied that provision.[11] Under Rule 14.1(a), this Court is free to consider Bell's *Panetti* argument should it so choose.

Respondent also denies that clearly established federal law ever requires a hearing on state habeas, Resp. Br. 64-65, but *McNeal v. Culver*, 365 U.S. 109, 110, 117 (1961), *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 120-23 (1956), *Carter v. Texas*, 177 U.S. 442, 448-49 (1900), and *Coleman v. Alabama*, 377 U.S. 129, 133 (1964), are all to the contrary.

CONCLUSION

The judgment of the Fourth Circuit should be reversed, and the case remanded with instructions to grant habeas relief.

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[11] Bell cannot be faulted for failing to make this alternative argument to the Fourth Circuit, as he had no reason to believe that court would ignore *Monroe*, its own binding precedent.

Respectfully submitted,

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